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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF MONTANA,

IN AND FOR THE COUNTY OF LEWIS AND CLARK

* * * * * * * * * * * * * * * * *

THE MONTANA WILDERNESS ASSOCIATION, and GALLATIN SPORTSMEN'S ASSOCIATION, INC., Plaintiffs, -vs- THE BOARD OF HEALTH AND ENVIRONMENTAL SCIENCES OF THE STATE OF MONTANA; THE DEPARTMENT OF HEALTH AND ENVIRONMENTAL SCIENCES OF THE STATE OF MONTANA, Defendants, BEAVER CREEK SOUTH, INC., a corporation, Intervenor.	No. 38092 BRIEF AMICUS CURIAE

STATEMENT OF THE CASE

In the spring of 1974, a plat was submitted for approval to the Department of Health by the developers of Beaver Creek South, a subdivision proposed for development in the Gallatin Canyon. In June, 1974, the Department released its final environmental impact statement on the subdivision, pursuant to the Montana Environmental Policy Act (MEPA), 69-6504(b)(3), R.C.M. 1947. In July, Plaintiffs in this action filed their first complaint, alleging, inter alia, the inadequacy of the Department of Health's impact statement. On October 9, 1974 the Department issued a "revised final" environmental impact statement (EIS). On February 11, 1975, this Court dismissed the complaint on ripeness grounds, and because the complaint was not addressed specifically to this revised EIS. On February 14, 1975 the Department conditionally removed the sanitary restrictions from the proposed subdivision. Plaintiffs filed a second complaint on February 20. The second complaint again alleged inadequacies in the revised final EIS, and in support of that allegation, noted that the EIS fails to comply with the guidelines for preparation of environmental impact statements promulgated by the Environmental Quality Council.

As the agency established by MEPA to oversee and coordinate the implementation

of the act, the Environmental Quality Council (EQC) takes interest in the present action. The EQC is particularly concerned with the legal relationship between MEPA and EQC's guidelines. It is the Council's position that the EQC guidelines carry conclusive weight in determining whether an agency's actions comport with the procedural standards imposed by MEPA. With the Court's permission, the Environmental Quality Council submits this brief as amicus curiae in order to clarify the legal status of the EQC guidelines, and to discuss the Department of Health's failure to comply with those guidelines.

QUESTIONS PRESENTED.

As amicus curiae, the Environmental Quality Council will restrict its discussion in this brief to the following questions:

I. WHETHER THE ENVIRONMENTAL QUALITY COUNCIL'S GUIDELINES FOR THE PREPARATION OF ENVIRONMENTAL IMPACT STATEMENTS ARE ACCURATE EXPRESSIONS OF THE LEGISLATIVE INTENT BEHIND THE ENVIRONMENTAL POLICY ACT, AND THEREFORE ENTITLED TO GREAT WEIGHT IN THE COURT'S CONSIDERATIONS.

II. WHETHER THE DEPARTMENT OF HEALTH'S ENVIRONMENTAL IMPACT STATEMENT ON BEAVER CREEK SOUTH FAILS TO COMPLY WITH THE ENVIRONMENTAL QUALITY COUNCIL'S GUIDELINES AND IS THEREFORE INADEQUATE.

I. THE ENVIRONMENTAL QUALITY COUNCIL'S GUIDELINES FOR THE PREPARATION OF ENVIRONMENTAL IMPACT STATEMENTS ARE ACCURATE EXPRESSIONS OF THE LEGISLATIVE INTENT BEHIND THE ENVIRONMENTAL POLICY ACT, AND ARE THEREFORE ENTITLED TO GREAT WEIGHT IN THE COURT'S CONSIDERATIONS.

EQC's duties require it to construe and interpret MEPA.

In 1971, the Legislature, in the Montana Environmental Policy Act (MEPA), 69-6501 et seq., R.C.M. 1947, declared it to be

> the continuing responsibility of the state of Montana to use all practicable means, consistent with other essential considerations of state policy, to improve and coordinate state plans, functions, programs and resources (emphasis added)

to assure the preservation and enhancement of a wide range of environmental values. (69-6503(a)) In addition to declaring that every person is "entitled to a healthful environment" and noting that each person "has a responsibility to contribute to the preservation and enhancement of the environment," (69-6503) MEPA addresses itself specifically to the various state agencies, directing that

> to the fullest extent possible, (a) the policies, regulations, and laws of the state shall be interpreted and administered in accordance with the policies set forth in this act, and (b) all agencies of the state shall
> (1) utilize a systematic, interdisciplinary approach...in planning and decision making...
> (2) include in every recommendation or report on proposals for projects, programs, legislation and other major actions of state government significantly affecting the quality of the human environment, a detailed statement.... (69-6504) (emphasis added)

The preparation of these environmental impact statements (EISs) has become the most important practical procedure through which state agencies have responded to the responsibilities imposed upon them by MEPA. The language of MEPA makes clear that mechanical and superficial compliance with the policies and procedures set out in the act will not be sufficient. Agencies are required, "to the fullest extend possible," to make consideration of environmental factors an essential part of their programs and policies.

The legislature was not content to leave the adoption of MEPA's policies completely to the judgement of those agencies on whom the burden of implementation was to fall. Section 8 of MEPA created the Environmental Quality Council, a legislative agency, and entrusted to the executive staff of

of EQC the responsibility (inter alia)

> (b) to review and appraise the various programs and activities of the state agencies in the light of the policy set forth in section 3[69-6503] for the purpose of determining the extent to which such programs and activities are contributing to the achievement of such policy, and to make recommendations to the governor and the legislative assembly with respect thereto... (i) to review and evaluate operating programs in the environmental field in the several agencies to identify actual or potential conflicts, both among such activities, and with a general ecological perspective, and to suggest legislation to remedy such situations (69-6514) (emphasis added)

In addition, all state agencies were to submit to the EQC by July 1, 1972, their proposals for revising agency authority and policies to bring them into conformity with the requirements of MEPA (69-6505).

Thus, it is the responsibility of the EQC to review, appraise and evaluate agency programs and activities, to determine whether those programs and activities are in compliance with the policies of MEPA, and to identify conflicts among agency programs and with the ecological perspective of MEPA.

In order to evaluate agency activity in light of MEPA's policies, it was necessary for EQC to interpret and construe ambiguous and vague portions of the statute. These interpretations could then be applied to agency action and the appraisals made. It is generally recognized that an agency charged with the administration of a statute may interpret and construe that statute in order to perform its functions:

> where there is an ambiguity in the statute as to whether the latter does or does not cover a particular matter, a practical construction of the statute shown to have been the accepted construction of the agency charged with administering the matters in question under the statute will be one factor which the court may take into consideration as persuasive as to the meaning of the statute. E. C. Olsen Co. v. State Tax Commission, 109 Utah 563, 168 P2d. 324 (1946)

See also, Skidmore v. Swift & Co., 323 US 134 (1944); U.S. v. Bergh, 352 US 40 (1956); Whitcomb Hotel Co. v. California Employment Commission, 24 Cal 2d 753, 151 02d 233 (1944). California Co. v. Udall, 296 F2d 384 (D.C. Cir. 1961). The construction and interpretation by an administrative agency of the law under which it acts provides a practical guide as to how the agency will seek to apply the law, and an experienced and informed judgement to which courts and litigants may properly resort for guidance. 2 Am. Jur. 2d, Administrative Law § 236 Such an interpretation by the agency charged with overseeing the

implementation of a statute should "not be disturbed except for weighty reasons." Brewster v. Gage, 280 US 327, 336 (1930).

Interpretations of MEPA by EQC, a legislative agency, represent the legislative intent behind the law.

While these and other cases recognizing the validity of agency interpretation of statutes are concerned specifically with administrative or executive agencies, the reasoning applies with equal force to a legislative agency such as EQC. Regardless of the branch of government with which an agency is affiliated, when it is given the statutory responsibility to appraise and evaluate activities and to make recommendations based on those appraisals, interpretation of the statute by that agency is an essential and unavoidable concomitant to the performance of its duties. Such interpretations have validity not because the agency directly administers the statute, but because the interpretations are "based upon more specialized experience and broader investigations and information" than are available to other branches or agencies of government. Skidmore v. Swift and Company, supra. This is especially the case when the agency's interpretations express "the opinions of men who probably were active in the drafting of the statute." Whitcomb Hotel Co. v. California Employment Commission, supra, at 235. In this regard it should be noted that Senator George Darrow, the sponsor of MEPA in the legislature, was chairman of the EQC when the guidelines were first adopted by the Council.

Because of EQC's identification with the legislative branch of government, its interpretations of the law have an important implication not shared by executive agency rules and regulations. The legislative branch's function does not terminate with the enactment of laws. It has the further responsibility to keep an eye on the manner in which those laws are implemented. "One of the fundamental concepts of our form of government is that the legislature, as representative of the people, will maintain a degree of supervision over the administration of governmental affairs." (Gellhorn and Byse, Administrative Law, 82) Executive and administrative agencies do not have a completely free hand in making policy. They are subject to legislative supervision to insure

that executive and administrative actions may accurately reflect legislative intent. This is recognized on the Federal level:

> For there to be truly effective checks upon administrative action, the courts must be supplemented by congressional oversight. The Congress is the one great organ of American government that is both responsible to the electorate and independent of the Executive. As the source of delegations of administrative power, it must also exercise direct responsibility over the manner in which such power is employed. (B. Schwartz, An Introduction to American Administrative Law, 70).

The Montana Supreme Court has recognized the same principle on the state level:

> When the legislature confers authority on an administrative agency, it may lay down the policy or reasons behind the statute, and also prescribe standards and guides for the grant of power which has been made...the legislature must set limits on such agency's power and enjoin on it a certain course of procedure and rules of decision in the performance of its function. (Bacus v. Lake County, 138 Mont. 69, 354 P2d 1056, 1061 (1960))

Many of the administrative and executive agencies of the state have been granted the authority to promulgate rules and regulations in order to perform their duties. With respect to MEPA, it is necessary for many of those agencies to develop procedures for the preparation and circulation of environmental impact statements. The development of these procedures involves rule making type activity, and rule making is essentially a legislative function. When the legislature delegates legislative authority to other branches of government, the responsibility to supervise that delegated authority is even more compulsory than the general responsibility to oversee executive actions. All such powers conferred upon administrative and executive agencies by the legislature must be carefully circumscribed. "The delegation of uncontrolled discretion is invalid. The legislature must specify a sufficiently clear test or standard for an agency to exercise its discretion in making rules and regulations." (Hampton and Company v. U.S., 276 US 394 (1928)). "The discretion conferred must not be so wide that it is impossible to discern its limits. There must instead be an ascertainable legislative intent to which the exercise of the delegated power must conform" (B. Schwartz, An Introduction to American Administrative Law, P. 34)

Thus, the legislature, in the exercise of its law-making powers, has a

responsibility to assure that its policies are adhered to by the executive branch. The legislature has a wide range of options to choose from in performing its oversight responsibilities. An obvious one is control of appropriations. Legislative approval of agency performance is tacitly extended or withdrawn depending on the size of the budget granted to the agency. In addition, amendatory legislation may revise an agency's duties or powers. In Montana, as in many other states, the legislature has ultimate approval authority over all rules and regulations promulgated by administrative agencies, and may, by joint resolution, direct agencies to adopt or amend rules. (82-4203,1, R.C.M. 1947)

A device which Congress has used with some success on the federal level is the establishment of standing or watchdog committees to oversee executive performance in specialized fields. Standing committees have been charged by law with responsibility for exercising "continuous watchfulness" of administrative agencies' execution of their assigned duties. (Section 136 of the Legislation Reorganization Act of 1946 (60 Stat 831)) MEPA established the EQC to carry out just such a watchdog function. Thus, the EQC's interpretations of the requirements imposed on executive agencies by MEPA, while they do not enjoy the binding effect of statutes or regulations, are an expression of legislative intent which cannot be ignored by either the agencies or the courts.

The EQC, therefore, regards its guidelines as representing an accurate interpretation of the requirements of MEPA, and entitled to great weight in determining the extent to which an agency has complied with the law. Ultimately, of course, this is a question which can only be resolved by the courts. It is for the courts to give the final and authoritative interpretation to statutes (Davier Warehouse Company v. Bowles, 321 US 144 (1943); Whitcomb Hotel Company v. California Employment Commission, 24 Cal 2d 753, 151 02d 233) and to determine the legality of government activity. The EQC believes that the courts must consider all relevant evidence and opinions in determining agency compliance with MEPA. The EQC also believes that the Council's opinions are entitled to special consideration because of its specific responsibility to monitor compliance with MEPA. The following discussion, it is hoped, will clarify the

origin and development of EQC's guidelines, and will explain in more detail why we believe the guidelines embody the most accurate statement of legislative intent behind MEPA.

The National Environmental Policy Act and Federal Court Interpretation of That Act Should Serve as a Model for Interpretation of MEPA.

The EQC guidelines have their origin in the guidelines developed by the federal Council on Environmental Quality established by NEPA. They follow closely the procedures developed by the CEQ, and represent the culmination of four years of judicial and administrative interpretation and application of NEPA and the various state environmental policy acts which are NEPA's progeny. The guidelines are designed to provide for state agencies the shortest and surest procedural path for compliance with MEPA.

There have been as yet no definitive judicial determinations in Montana of the weight to which the EQC guidelines are entitled, but there has been a wealth of litigation in the federal courts and in other states arising under NEPA and the various state environmental policy acts. The role of guidelines such as EQC's has been clarified in those jurisdictions, and provides helpful guidance in determining the effect of EQC's guidelines in Montana.

As has been noted, the Montana EPA, like similar acts in other states was modeled closely after the National EPA. Montana's Supreme Court has recognized the importance of the judicial construction in other jurisdictions of "borrowed" statutes. Although such construction is not binding, the Court

> [has] long observed in [their] decisions that where a statute is similar to one in a sister state, [they] should give consideration to the construction which it had received by the courts of the state where it had been previously adopted...
>
> Cahill-Mooney Construction Co. v. Ayres
> 140 Mont. 464, 467, 373 P2d 703 (1962)

Further,

> We understand the rule to be that the construction put upon statutes by the courts of the state from which they are borrowed is entitled to respectful consideration, and that only strong reasons will warrant a departure from it...
>
> Ancient Order of Hiberniaus v. Sparrow
> (29 Mont. 132, 135-6 (1903))[1]

1. It should be noted that the statutes referred to in the cited cases had already received judicial interpretation in the sister states at the time the statute was enacted in Montana, and this interpretation was therefore considered part of the (informal) legislative history of the

statute. Judicial interpretation by sister states which occurs subsequent to Montana's adoption of the statute in question may perhaps carry less weight, but the principle of parallel construction still applies.

Other states whose environmental policy acts closely resemble NEPA have recognized the relevance of judicial and administrative interpretations of the act on the federal level. In Friends of Mammoth v. Mono County, 8 Cal 3rd 247, 502 P2d 1049 (1972) an important California case arising under that state's Environmental Quality Act (EQA), Cal P.R.C. Sec. 21000 et seq., the California court noted that the EQA was patterned after NEPA, and that therefore definitions provided by the federal Council on Environmental Quality (CEQ) were relevant.

> In view of the similarity between the federal and state acts, the Legislature obviously was aware of the federal definitions when the EQA was passed...Accordingly, the definitions promulgated by the CEQ are helpful to an understanding of the subsequent California use of the word....

The New Mexico Supreme Court, in City of Roswell v. New Mexico Water Quality Control Commission, 84NM560, 505 P2d 1237 (1973) noted that

> ...the New Mexico Environmental Quality Control Act is closely patterned after the NEPA...which has been characterized as the most important legislative act of the decade, and also as our "environmental constitution". It was surely intended that on the state level NMEQCA would fulfill as important a role and have as profound an impact as the national act
> (505 P2d at 1240)

The courts of the state of Washington have also been influenced by the similarity between their state environmental policy act and NEPA.

> It is well settled that when a state borrows federal legislation it also borrows the construction placed upon such legislation by the federal courts...
> Juanita Bay Valley Community Association v. City of Kirkland, 9 Wn App 59, (510 P2d 1140, at 1146 (1973))

The federal act, then, can serve as a model, and the treatment by federal courts of the CEQ guidelines will be helpful in determining the proper role of Montana's EQC, and the guidelines which it has promulgated.

Before proceeding with a more thorough analysis of the federal experience, it is necessary to clarify an uncertainty which has arisen as to the relevance of that experience to Montana. The federal Council on Environmental Quality is an executive branch entity allocated to the Office of the President. By

executive order, the CEQ has been given the authority to promulgate guidelines within the statutory provisions of the National Environmental Policy Act. For that reason, it has been suggested that the guidelines developed by the CEQ are entitled to greater weight with federal courts than are EQC's guidelines in Montana. This is not the case.

Although the CEQ is allocated to the executive branch of the federal government, it has no more administrative responsibility than does the EQC. Indeed, the language of NEPA creating the CEQ and describing its duties is almost identical to the language of MEPA creating the EQC. Both agencies are directed to appraise, review, evaluate, recommend. Nowhere in the federal act are guidelines explicitly mentioned. The CEQ was given authority to promulgate guidelines by executive order, (Executive Order 11514, 35 Fed. Reg. 4247, March 5, 1970) but that order neither expanded the CEQ's administrative duties, nor determined the degree to which the guidelines would be binding on federal agencies. As will be demonstrated in the discussion below, the federal courts did not give weight to CEQ's guidelines simply because CEQ was identified with the executive branch, or simply because of the executive order. Rather, the courts have accepted CEQ interpretations of NEPA because of that agency's duty to oversee the implementation of the Act, and its familiarity with the requirements of preparing EISs.

The EQC's familiarity and expertise with respect to MEPA are exactly analogous. Furthermore, the Montana legislature in House Joint Resolution 73 (see attachment) explicitly recognized the validity of EQC's guidelines, and declared them to be, in at least one respect, an accurate representation of legislative intent.

The Federal Courts Have Given Great Weight to the Comments and Recommendations of the Federal Council on Environmental Quality, and Have Incorporated CEQ Guidelines Into Their Judicial Decisions.

In the four years since NEPA was enacted there have been between two and three hundred suits brought in the federal courts which have clarified many aspects of the act and of the proper administrative implementation of the act. In a large number of those cases, the courts have made references to the CEQ

guidelines and have often looked to those guidelines for direction and support. In one of the leading cases, Greene County Planning Board v. F.P.C., 455 F2d 412 (2nd Cir., 1972) the court remarked that although it considered the guidelines to be only advisory,

> we would not lightly suggest that the Council, entrusted with the responsibility of developing and recommending national policies 'to foster and promote the improvement of the environmental quality,'...has miscontrued NEPA.
> (455 F2d at 421)

Even though the court appears to have qualified the authority of the guidelines, it should be pointed out that the court was in no way ignoring or over-ruling the guidelines. They were rather challenging the FPC's interpretation of those guidelines, and, indeed, imposed even stricter procedural requirements on the FPC than that commission had thought necessary.

Other courts have been more emphatic in their endorsement of the CEQ's interpretation of NEPA. In Environmental Defense Fund v. Corps of Engineers, 325 F. Supp. 728, (E.D.Ark., 1971), the court gave great weight to the CEQ's determination of the importance of a proposed federal action.

> Such an administrative interpretaion cannot be ignored except for the strongest reasons, particularly where...[the] interpretation...[is] a construction of a statute by the men charged with the responsibility of putting that statute into effect.
> (325 F. Supp. at 744.)

In SCRAP v. U.S., 346 F. Supp. 189; 412 US 669 (1972), the court quoted the CEQ guidelines and indicated that in reaching its holding, the court relied on those guidelines for support.

> In light of [the CEQ's] interpretation of the statutory language, we think it clear beyond a doubt that this order is a 'major federal action'
> (345 F. Supp. at 200)

In devising its resolution of the issue in that case, court considered the guidelines to provide the proper model.

> [W]e have decided to retain jurisdiction over this matter so as to insure that any permanent tariffs which are permitted to take effect are preceded by an impact statement in conformance with NEPA and the CEQ guidelines (emphasis added)
> (346 F. Supp. at 194-5)

The Sixth Circuit, in Environmental Defense Fund v. Tennessee Valley Authority, 468 F2d 1164 (1972), held against the TVA, at least in part, because of that

agency's violation of CEQ guidelines.

> We conclude that appellants' contentions ignore the language and policy of NEPA, violate regulations promulgated both by the CEQ and by the TVA itself, and are against the clear weight and trend of the case law that has developed under the act.
> (468 F2d at 1172-3.)

After quoting from the guidelines at length as to the applicability of NEPA to ongoing projects, the court summed up by saying:

> Such an administrative interpretation by the agency charged with implementing and administering the NEPA is entitled to great weight.
> (468 F2d at 1178)

Other federal cases in which courts rely on CEQ guidelines to support their holdings include: Scientists Institute for Public Information v. AEC, 481 F2d 1076, 1088 (D.C.Cir,. 1973) (cites guidelines for including recommendations for appropriations as "major federal action"); Jicarilla Apache Tribe of Indians v. Morton, 471 F2d 1275, 1285 (9th Cir., 1973) (quotes guidelines with respect to requirements for a hearing); Hanley v. Kleindienst, 471 F2d 823, 828, 838 (2nd Cir., 1972) (quotes guidelines with respect to threshold determination of "significance" of federal action); Environmental Defense Fund v. Corps of Engineers, 470 F2d 289, 296-7, (8th Cir., 1972) (cites guidelines in connection with retroactive application of NEPA, and consideration of alternative courses of action); City of Boston v. Volpe, 464 F2d 254, 258 (1st Cir., 1972) (cites guidelines dealing with need to consider cumulative effects of proposed actions); Calvert Cliffs Coordinating Committee v. AEC, 449 F2d 1109, 1118 (D.C.Cir., 1971) (refers to guidelines with respect to consideration of alternatives); Daly v. Volpe, 350 F. Supp. 252, 260, (W.D. Wash., 1972) (cites guidelines with respect to need for public participation); Environmental Law Fund v. Volpe, 340 F. Supp. 1328, 1331-2 (N.D. Cal., 1972) (cites guidelines as to practicability of review of ongoing projects); Izaak Walton League of America v. Schlesinger, 337 F. Supp. 287, 295 (D.D.C., 1971) (cites guidelines as to threshold determination of need for EIS); Goose Hollow Foothills League v. Romney, 334 F. Supp. 877, 879 (D. Ore., 1971) (quotes guidelines with respect to definition of "major federal action").

EQC Interpretations of MEPA are Entitled to Greater Weight Than are Interpretations by other Agencies.

It is fundamental that all administrative agencies are entitled to interpret, to some degree, the statutes under which they operate, and these interpretations are entitled to weight by the courts in determining the meaning of the law. U.S. v. Bergh, 352 US 40 (1946); Kolovrat v. Oregon, 366 US 187; Whitcomb Hotel Company v. California Employment Commission, 24 Cal 2d 753, 151 P2 233 (1944); State v. King Colony Ranch, 137 Mont. 145, 350 P2d 841 (1960). But it is for the courts to determine how much weight it is appropriate to assign to such opinions. Lassiter v. Guy F. Atkinson Company, 176 F2d 984 (9th Cir. 1949). Where more than one agency has interpreted the same statute, the courts may often have to choose among divergent interpretations. The greatest weight should be given to the opinions of that agency which has the most direct responsibility for the application of the policies established by the statute in question; that agency

> on whom the legislature must rely to advise it as to the practical working out of the statute, and [whose] practical application of the statute presents the agency with unique opportunities and experiences for discovering dificiencies, inaccuracies, or improvements in the statute. E.C. Olsen v. State Tax Commission, 109 Utah 563, 168 P2d 324 (1946)

The federal courts have accepted as a rule that in the construction and application of NEPA, the opinions of the CEQ are entitled to greater weight than the determinations of other federal agencies. As the agency entrusted with the supervision of the implementation of NEPA, "the [CEQ's] guidelines were intended to govern HUD's environmental decisions...." Goose Hollow Foothills League v. Romney, 334 F. Supp. 877, 879 (D. Ore., 1971).

In Ely v. Velde, 451 F2d 1130 (4th Cir., 1971), the Law Enforcement Assistance Agency (LEAA) interpreted the Safe Streets Act as preventing it from requiring a state agency to prepare an EIS before construction of a prison facility with federal funds. The LEAA argued that its own interpretation of NEPA was controlling. The Court disagreed.

> We are of the opinion that the LEAA's interpretation is entitled to no such weight. The Safe Streets Act is not the only statute under consideration here. What we are called upon to decide is

> the relationship of three statutes,[2] each of which creates an agency charged with its own administration...
>
> The CEQ as the agency created by NEPA, interprets its governing statute as binding on all federal agencies 'unless existing law applicable to the agency's operations expressly prohibits or makes compliance impossible.' (cites guidelines)
>
> The Supreme Court has recognized that administrative practice is not entitled to special weight when, as here, it clashes with the interpretation given by other agencies to statutes they were created to administer.
> (451 F2d at 1135)

The court went on to uphold CEQ's interpretation of the LEAA's responsibility to prepare an impact statement.

In Hanley v. Kleindienst, 471 F2d 823 (1972), Judge Friendly in a dissenting opinion made clear this distinction between the front-line federal agencies who are mandated by NEPA to consider environmental factors in their decision-making, and CEQ, NEPA's "watch-dog"

> Beyond the general scheme of the legislation, a court normally looks for guidance, in the case of a statute calling for administrative action, to the views of those charged with its administration. [citations omitted] However, this does not mean that dominating weight should be given to the views of agencies upon whom NEPA placed a duty to make impact statements when the result would be to relieve them from that oblication...The NEPA established its own watch-dog agency, the Council on Environmental Quality.
> (471 F2d at 838)

In addition to the guidelines per se, the comments and memoranda issued by the CEQ have often carried weight in the deliberation of the federal courts. In Warm Springs Task Force v. Gribble, 6ERC 1747 (1974), the issue was the adequacy of an EIS prepared by the Corps of Engineers. The CEQ in a letter announced its opinion that the guidelines had not been followed and that the EIS was inadequate in several respects. The district court upheld the EIS, but Justice Douglas, acting as circuit justice for the 9th Circuit, overruled the district court solely on the basis that the Court had ignored the CEQ recommendations, observing that "CEQ is given authority under NEPA to: Review and appraise the various programs and activities of the federal government in light of the policy set forth [in NEPA]...(6ERC at 1748)." Justice Douglas concluded that

2. The National Historic Preservation Act was also involved here.

> the Council on Environmental Quality ultimately responsible for the administration of the NEPA and most familiar with its requirements for EIS's, has taken the unequivocal position that the statement in this case is deficient, despite the contrary conclusions of the district court. That agency determination is entitled to great weight [citations omitted] and it leads me to grant the requested stay pending appeal in the Court of Appeals (id.)

The full Supreme Court concurred in this opinion by denying a petition to vacate the stay.[3] Thus, the Supreme Court has recognized that, although the CEQ's opinions are not technically binding, they are extremely persuasive because of the particular responsibility and expertise of that agency. EQC's responsibility and expertise derive from almost identical statutory language, and should be equally persuasive.

It is just as true on the state level as on the federal level that the special agency created by the Environmental Policy Act is in the best position to interpret it. EQC's mandate is defined solely by MEPA, while executive agencies have additional responsibilities elsewhere. In addition, EQC's use of guidelines promotes the consistency of judgement to which courts give particular weight. Federal Maritime Board v. Isbrandtsen Company, 356 US 481; Mabee v. White Plains Publishing Company, 327 US 178. Furthermore, the endorsement of the guidelines by the legislature in HJR 73 (see attachment) is also entitled to weight by the courts. State v. Toomey, 135 Mont. 35, 335 P2d 1051 (1959); Mugavin v. Nyquist, 358 N.Y.S. 2d 980 (1974).

CEQ's guidelines are an accurate interpretation of NEPA not only because of the general expertise developed by that agency, but also because of the particular way in which the guidelines have been developed and revised over the years.

The guidelines are revised from time to time in order to more clearly reflect the prevalent judicial handling of NEPA. In turn, the federal courts often incorporate, or expand on, the guidelines.

3. Other cases in which CEQ comments are relied on by the Court include SCRAP v. U.S., 346 F. Supp. 189; Scientists Institute for Public Information v. AEC, 481 F2d 1079.

This pattern of development is exemplified in Natural Resources Defense Council v. Morton, 458 F2d 827 (D.C.Cir., 1972).

> The holding of NRDC v. Morton in early 1972 discussed the need to consider a broad range of alternatives whenever the proposed action is an integral part of a broad federal program. Then, in May, 1972, CEQ recommended to agencies that in certain situations broad program statements would be appropriate in order to properly assess the full scope of the environmental impact. This recommendation drew on the ideas of NRDC v. Morton and made them applicable to a wider range of agency actions. This recommendation in turn served as one of the bases for the court's holding in SIPI v. AEC, [481 F2d 1079 (D.C.Cir., 1972)] that in large technology development programs, broad program statements are required under NEPA in addition to subsequent individual statements. Finally, the holding of SIPI v. AEC was codified in the CEQ guidelines, thus transforming a policy concept into a new legal requirement. The process resembles a feedback loop whereby a new position taken by CEQ induces a corresponding change which in turn produces a further change in the CEQ interpretation of NEPA. This process has taken place throughout the three years of NEPAs life...and...has been an intimate part of the process of NEPA's growth.
>
> (This discussion is taken from "CEQ Guidelines and Their Influence on the NEPA", by Herbert F. Stevens in 23 Catholic Law Review 547 (1974), at p. 571.)

Another example of this process was provided by SCRAP v. U.S., 346 F. Supp. 189 (1972), where the district court expressed dissatisfaction with the Interstate Commerce Commission's inadequate compliance with NEPA.

> Indeed, the draft [EIS] is so deficient that it may not comport with the statutory requirement that the Commission permit comment from interested parties before making its impact statement final. (346 F. Supp. at 194 n. 8)

Thus the notion of a draft EIS, reflecting the two-stage review process developed by the CEQ, was adopted by the court as the most acceptable way to satisfy the public participation requirements of NEPA.

EQC's guidelines, modeled after CEQ's, incorporate the results of this "feedback" process.[4] In addition, EQC revises its guidelines periodically to

4. Some examples of judicial holdings which are part of EQC and CEQ guidelines:
   1. Assessment of all impacts is required
      a. assessment must be made early in the decision making process; Calvert Cliffs Coordinating Committee v. AEC, 449 F2d 1109.
      b. Concerned parties should be consulted; Akers v. Resor, 339 F. Supp. 1375.
      c. All known possible environmental consequences should be addressed; Environmental Defense Fund v. Corps of Engineers,
      d. Economic and technical benefits must be weighed against the environmental costs incurred in a particular action; EDF v. Corps of Engineers, supra.
      e. A good faith effort requires a discussion of all impacts of a given action, including political, social, economic, and cultural impacts as well as ecological impacts; Calvert Cliffs, supra.

reflect problems which arise. Comments and suggestions from state agencies play an important role in these guideline revisions. This incorporation of agency experience adds to the weight to which the guidelines are entitled.

Conclusion

The federal courts have made it clear that although the CEQ guidelines are not legally binding in a formal sense, they are entitled to great weight. The courts have been consistently guided in their decisions by the interpretations of NEPA provided by the CEQ. Most important, CEQ's guidelines and current judicial opinions reinforce and complement each other in a dynamic manner.

The guidelines of Montana's Environmental Quality Council were modeled closely after the federal guidelines, and therefore have incorporated current federal interpretations of environmental policy. Because of the similarity between the federal and state acts and the federal and state guidelines, the federal experience should be particularly relevant in applying MEPA to the actions of state agencies.

In addition, the EQC guidelines reflect a process of evaluation of state programs and consultation with state agencies which makes these guidelines a particularly relevant interpretation of the Montana Environmental Policy Act. The guidelines embody EQC's judgement, based on the four-year history of the state and federal statutes and on expertise developed by the EQC staff during that period, as to the proper interpretation of the requirements imposed on state agencies by MEPA. They represent, in other words, EQC's interpretation

2. Environmental Impact Statement requires the early and thorough circulation of a draft statement; later, all comments received must be circulated; EDF v. Corps of Engineers, supra.
3. Environmental Impact Statement process requires a thorough discussion of all feasible alternatives, including the alternative of taking no action; EDF v. Corps of Engineers, supra.
4. Environmental Impact Statement process requires a thorough discussion of the problems and objections raised by commenting parties, Latham v. Volpe, 455 F2d 1111.
5. Environmental Impact Statement process requires that the document be factual, specific, and allow non-expert readers to evaluate conclusions intelligently. EDF v. Corps of Engineers, 492 F2d 1123.

of the legislative intent behind MEPA. The guidelines have been developed in such a way that when they are followed, MEPA is almost certainly satisfied (at least procedurally). But when agency action departs substantially from the guidelines, compliance with MEPA, in EQC's judgement, is doubtful.

The EQC guidelines, therefore, should carry great weight in determining the legal sufficiency of executive agency actions. A court's responsibility is to determine whether an agency has violated MEPA, and the EQC guidelines are the surest indication of whether or not MEPA has been satisfied. If the agency's actions depart substantially from EQC requirements, the agency must bear the burden of showing that it has not violated MEPA.

II. THE DEPARTMENT OF HEALTH'S ENVIRONMENTAL IMPACT STATEMENT ON BEAVER CREEK SOUTH FAILS TO COMPLY WITH THE ENVIRONMENTAL QUALITY COUNCIL'S GUIDELINES AND IS THEREFORE INADEQUATE.

The Department's Discussion of Alternatives is Inadequate

Section 69-6504(b)(3)(iii) of MEPA requires the detailed statement (EIS) to include "alternatives to the proposed action." Section 69-6504(b)(4) goes on to require agencies to

> study, develop and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources.

The federal courts, as a rule, have read these two clauses in conjunction. (See, e.g., Calvert Cliffs Coordinating Committee v. AEC, 449 F2d 1109 (D.C.Cir. 1971)) to find that the discussion of alternatives in the impact statement must amount to more than simply mentioning the alternatives. The EQC guidelines, taken from the guidelines of the federal Council on Environmental Quality, expand on these requirements:

> A rigorous exploration and objective evaluation of alternative action (including no action at all) that might avoid some or all of the adverse environmental effects is essential. In addition, there should be an equally rigorous consideration of alternatives open to other authorities. Sufficient analysis of such alternatives and their costs and impact on the environment should accompany the proposed action through the agency review process in order not to foreclose prematurely options which might have less detrimental effects. (EQC guidelines 6.a.(4))

The discussion of alternatives in the EIS is a crucial part of the environmental review process. MEPA puts a great deal of emphasis on the utilization of an "interdisciplinary approach" by state agencies in making their decisions (69-6504(b)(1)), and requires state agencies to coordinate plans and programs with an eye to preserving environmental amenities for future generations. 69-6503(a)) For these reasons, it is necessary that the decision maker have before him

> all possible approaches to a particular project (including total abandonment of the project) which would alter the environmental impact and cost benefit balance. Only in that fashion is it likely that the most intelligent, optimally beneficial decision will ultimately be made. Calvert Cliffs Coordinating Committee v. AEC, 449 F2d 1109, at 1114

In NRDC v. Morton, 337 F. Supp. 165 (D.D.C.), the court emphasized that the EIS should not merely mention the alternatives, but should attempt to assess the environmental risk of each, in comparison to the main proposal. The court also noted that alternatives beyond the power of the agency to implement must be discussed. Professor Frederick Anderson, in his authoritative book, NEPA in the Courts explains:

> if alternatives were limited to those which [the lead agency] could choose, the more basic question of how responsibility could best be apportioned among the departments would be ignored (p. 220)

In light of these requirements, the treatment of alternatives in the Department's final revised EIS is clearly inadequate. (see p. 50, final revised EIS) The Department does little more than mention three alternatives: to approve the plat as submitted; to grant conditional approval pending successful operation of the wastewater disposal system; to refuse to approve the plat. There is no discussion, detailed or otherwise, of the environmental impacts to be expected from the last two alternatives. There is no mention of other alternatives, such as requiring larger and fewer parcels, which would reduce environmental impact.

Perhaps most disturbing is the Department's statement that they are unable to refuse approval because "there is no legal justification for refusing to grant subdivision plat approval based on [environmental] grounds.

The EQC guidelines, in interpreting the policies set forth in MEPA, warn against such an "excessively narrow construction of existing statutory authorizations." (EQC Guidelines §2.a.) MEPA states explicitly that "the policies, regulations, and laws of the state shall be interpreted and administered in accordance with the policies set forth in this act." (69-6504(a)) Furthermore, section 69-6504 (3) requires the impact statement to discuss "(ii) any adverse environmental effects.... (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action..." (emphasis added) Thus MEPA requires a "systematic and interdisciplinary" analysis of the proposal, not an analysis limited to the particular expertise or jurisdiction of the agency.

In the landmark case, Calvert Cliffs Coordinating Committee v. AEC, 449 F2d 1109, the District of Columbia Circuit Court directly addressed this question. In that case, plaintiffs challenged AEC regulations which supervised construction of nuclear facilities, but which failed to provide for an independent evaluation of water quality problems. The court rejected AEC's approach to environmental analysis:

> We believe that the Commission's rule is in fundamental conflict with the basic purpose of the Act.
>
> The sweep of NEPA is extraordinarily broad, compelling consideration of any and all types of environmental impact of federal action...
>
> The Atomic Energy Commission, abdicating entirely to other agencies' certifications, neglects the mandated balancing analysis. Concerned members of the public are thereby precluded from raising a wide range of environmental issues in order to affect particular commission decisions. And the special purpose of [NEPA] is subverted. (Id.)

A large number of federal decisions have followed the lead of Calvert Cliffs in broadening the environmental responsibilities of executive agencies. (See, e.g., Silva v. Romney, 342 F. Supp. 783 (D.C. Mass., 1972); Hanly v. Kleindienst, 409 U.S. 990; Kalur v. Resor, 335 F. Supp. 1 (D.D.C., 1971); Getty Oil v. Ruckelshaus, 342 F. Supp 1006 (D. Del., 1972); EDF v. Corps of Engineers, 348 F. Supp. 916 (N.D., Miss., 1972); Sierra Club v. Froehlke, 345 F. Supp. 440 (W.D. Wis. 1972); Daly v. Volpe, 350 F. Supp. 252 (W.D. Wash. 1972); NRDC v. Morton, 337 F. Supp. 170 (D.D.C. 1972); SCRAP v. U.S. 346 F.

Supp. 189 (D.D.C. 1972).

A case which is particularly relevant is Kalur v. Resor, supra. That case involved a statute which authorized the Corps of Engineers to permit the deposit of refuse matter into a navigable river under certain conditions. The question in the case was whether the Corps was entitled to limit its considerations to water quality, or whether NEPA required it to prepare a comprehensive environmental analysis. The court held that the latter was the case:

> Congress...certainly did not grant a license to disregard the main body of NEPA obligations. There are no specific statutory obligations that the Corps of Engineers has that prevents it from complying with the letter of NEPA.... Obedience to water quality certifications under the Water Quality Improvement Act is not mutually exclusive with the NEPA procedures. It does not preclude performance of the NEPA duties. Water Quality certifications essentially establish a minimum condition for the granting of a license. But they need not end the matter. The Corps of Engineers can then go on to perform the very different operation of balancing the over-all benefits and costs of a particular proposed project, and consider alterations above and beyond the applicable water quality standards that would further reduce environmental damage.

This interpretation of an agency's responsibility is directly applicable to the Department of Health's duties under the Water Pollution Act (69-4801 et seq.) and the Sanitation in Subdivisions Act (69-5001 et seq.) Neither of those statutes mandate that the Department must grant approval of a subdivision upon a finding that certain specified prerequisites are met. Rather, the statutes direct the Department (or the Board of Health) to adopt rules for the administration of the laws.(69-4808.2, 69-5005) Where no explicit conflict exists between the Department's permit authority and its obligations under MEPA, the legislature's command that agencies comply with the policies of MEPA "to the fullest extent possible" (69-6504) cannot be ignored.

In any event, the Department's protestation that a non-approval decision is without legal basis is totally irrelevant to the discussion of alternatives in an environmental impact statement. The EIS is intended to discuss environmental impacts of possible courses of action so that decision makers will be able to arrive at a well-informed decision. It is not intended to

justify decisions already made. It is for that reason that MEPA requires that the EIS "accompany the proposal through the existing agency review processes," (69-6504(3)) and it is for that reason that the EQC guidelines recommend that draft and final impact statements be distributed for comment "at the earliest possible point in the agency review process in order to permit meaningful consideration of the environmental issues before an action is taken." (EQC Guidelines, 8.b.) (See, also, federal cases which have rejected impact statements for being overly conclusory: EDF v. Corps of Engineers (Gilham Damm), 325 F. Supp. 728 (E.D. Ark. 1970-71); City of New York v. U.S., 337 F. Supp. 150 E.D. N.Y. 1972); SCRAP v. U.S., 346 F. Supp. 189 (D.D.C. 1972))

There is no Adequate Discussion of Cumulative Impacts of Subdivision Development.

One of the fundemental purposes of a broad environmental policy law directed to all state agencies is to promote a systematic, interdisciplinary, and coordinated approach to decision making which impinges on the environment. This means that an agency must look beyond the impacts of the particular project considered in isolation, and must consider how that project relates to the entire complex of executive decision making, both now and in the future, in order that the state may

> fulfill the responsibilities of each generation as trustee of the environment for succeeding generations; and attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences; (69-6503(a))

The EQC guidelines deal with this point at considerable length: (EQC Guidelines 5.b.)

> The statutory clause "major actions of State government significantly affecting the quality of the human environment" shall be construed by agencies from the perspective of the overall, cumulative impact of the action proposed (and of further actions contemplated). Such actions may be localized and seemingly insignificant in their impact, but if there is a potential that the environment may be significantly affected, the statement shall be prepared.
>
> In deciding what constitutes "major action significantly affecting the environment," agencies should consider that the effect of many State decisions about a project or a complex of projects can be individually limited but

> cumulatively considerable. By way of example, two suitable illustrations can be drawn: (1) one or more agencies, over a period of years, commits minor amounts of resources at any single instance, but the cumulative effect of those individually minor commitments amounts to a major commitment of resources, or (2) several government agencies individually make decisions regarding partial aspects of a major action. The guiding principle is that the whole can be greater than the sum of the parts. The lead agency shall prepare an environmental impact statement if it is foreseeable that a cumulatively significant impact on the environment will arise from State action. "Lead agency" refers to the State agency which has primary authority for committing the State government to a course of action with significant environmental impact. As necessary, the Environmental Quality Council will assist in resolving questions of lead agency determination.

Such a cumulative approach is especially important in an area like the Gallatin Canyon, where the fragile "carrying capacity" of the ecosystem is in danger of being overwhelmed piecemeal. The Department's EIS recognizes that this danger exists (final revised EIS, p. 43), but fails to deal with the problem beyond mentioning it. The Department notes that the Gallatin Canyon Study Team from Montana State University is currently addressing this problem and that their reports are available to the public. The Department then drops the subject without making the slightest attempt to integrate the findings of the Gallatin Canyon Study into the impact statement.

For an impact statement to provide a good faith discussion of the cumulative effect of a series of proposed or predictable developments, the results of such a study should be included. And it is not a sufficient excuse to say that the study is still in progress. The most acceptable course of action may be to await the completion of the study. In his book, NEPA in the Courts, Professor Anderson discusses this matter:

> There are several objections to allowing action to continue while further study is carried out. The increased commitment of resources might swing the balance in favor of proceeding with an otherwise undesirable project. Moreover, adverse findings would be diluted, as they trickled in one after another instead of being collected and cogently set forth in one document for reviewers. One solution would be to require the agency to seek out testimony on the range and magnitude of the risks involved in proceeding without specific studies. (p. 216)

In EDF v. Hardin, 325 F. Supp. 1401 (D.D.C. 1971) the court echoed this analysis:

> [The requirement that agencies utilize a systematic, interdisciplinary approach]...makes the completion of an adequate research program a prerequisit to agency action. The adequacy of the research should be judged in light of the scope of the proposed program and the extent to which existing knowledge raises the possibility of potential adverse environmental effects.

In view of the fact that by far the largest number of impact statements received by the EQC deal with subdivision proposals, it is especially important that an environmental analysis procedure be developed which will address itself to the problems of cumulative impacts. As one example among many, consider the statement on page 33 of the revised final EIS:

> It is the concensus of opinion that the ultimate factor that will control the amount of development in the Gallatin Canyon will be the capacity of the highway to handle the traffic load that would be generated. Beaver Creek South would add to the traffic load on the highway, but...would not be the development that would make reconstruction [of the highway] necessary.

In other words, the problem is left for the future, when the options may have been restricted by short-sighted decisions made in the present. What will be the effect of future highway reconstruction in terms of air pollution, fuel consumption, visual impact, etc? What will be the effect on this and future subdivisions if highway reconstruction does not take place? What will be the cumulative social, economic and environmental impacts of continued subdivision development in Gallatin Canyon? If there is a density level beyond which development should not be allowed, how and when should that line be drawn? These are a few of the questions which are not even presented by the Department's discussion. This failure is one of the most crucial inadequacies in the revised final EIS.

The Need for a Programmatic Approach

Having reviewed some of the case law which explains the need for a full discussion of alternatives and cumulative impacts, it is appropriate now to put the Health Department's efforts into perspective. As the discussion above has demonstrated, one of the fundamental themes underlying MEPA is the coordination of state agency activity so that environmental matters may receive a systematic treatment by all agencies. One of the most vexing

problems which arise in applying MEPA to actions such as the present one is the limited expertise of the lead agency. Because of the current state of the laws in Montana, the Department of Health is the only state-level agency with approval authority over subdivisions. (The Subdivision and Platting Act, 11-3859 et seq., gives the Department of Intergovernmental Relations review authority, but IGR's approval is not required.) The statutes under which the Department operates in this regard address themselves specifically to water quality and waste water disposal. The Department has neither the expertise nor the specific jurisdiction to deal with such matters as wildlife preservation or highway construction (although the air pollution impacts of increased highway travel make the latter somewhat more closely related to Health Department responsibilities).

Nevertheless, MEPA imposes on the Department of Health and on all other agencies of the state the duty to interpret and administer its policies and regulations in accordance with the goals of MEPA. The preparation of an environmental impact statement is the mechanism by which the Department of Health, as "lead agency" must fulfill this responsibility.

(A strong argument might be made that the board of county commissioners of Gallatin County ought to be the lead agency. The Subdivision and Platting Act makes it their explicit responsibility to consider all environmental impacts in making their decisions. That statute also seems to make the county board an agent of the state, charged with the responsibility of seeing that environmental matters are considered, so the board is arguably a "state agency" to which MEPA applies. This interpretation of the law has not been widely accepted, however, and in any event, the county board was not named as defendant in this suit, so this must stand as a parenthetical comment.)

As mentioned above (p. 20, supra) one function of an EIS is to indicate how responsibility in environmental matters can best be apportioned among state agencies. For this reason, all impacts of the proposed action, from the perspective of all relevant state agencies, should be presented in the impact statement. In addition, discussions of possible related decisions

which might be made in the future by other agencies should be included. Ideally, an impact statement should serve as a source of information and a guide to decision making not only for the lead agency in the action under immediate consideration, but also for other agencies making related decisions now or in the future, and for the public in general. For this reason, an impact statement must discuss thoroughly even those impacts and alternative actions which the lead agency by itself is unable to control. This is the meaning of the characterization of environmental policy acts such as NEPA and MEPA as "full disclosure" laws:

> The "detailed statement"...should, at a minimum, contain such information as will alert the President, the Council on Environmental Quality, the public and, indeed, the Congress, to all known possible environmental consequences of proposed agency action. (emphasis in original) EDF v. Corps of Engineers. (Gillham Dam), 325 F. Supp. 728, at 759

And it is for this reason that the Department of Health has sidestepped its responsibility to make full disclosure by noting that environmental decisions are more properly made elsewhere (final revised EIS, p. 27-28).

It seems clear that the development of subdivisions in the Gallatin Canyon (or any similarly fragile environment) will have a cumulative impact far in excess of the impacts of any one subdivison taken by itself. Again, the county rather than the Department of Health seems to be proper place for long-range planning to occur. But again, the full disclosure responsibilities placed on the Department as lead agency require a comprehensive "programmatic" discussion of the cumulative impacts of increased development in the Canyon. The Department takes a first step in this direction with its discussion of predicted water impacts (final revised EIS, p. 44), but much more is necessary to satisfy MEPA.

Procedures need to be developed so that an impact statement analyzes all relevant impacts of future predicted development in the area. Ideally, such a broad programmatic EIS could then serve as a basis for future decisions by Health, by IGR, by the Highway Department, by the county. The comprehensive programmatic approach would only have to be taken once in a given area--a concerted effort by all agencies with relevant expertise--and future EISs for

particular projects would require only minimal updating and specifics.

This programmatic approach has not yet been developed by any agency, but it is a necessity for compliance with MEPA. Without such a programmatic-cumulative impact statement to back it up, the present EIS is insufficient. This is not to say that the Health Department must necessarily base its own decisions with respect to sanitary restrictions on the full range of cumulative environmental effects of subdivision development, but as the responsible state agency, the Department must prepare an impact statement which addresses those matters, so that all decision makers are adequately informed of the issues. Perhaps it is impractical to require the Department of Health to develop the necessary procedures before approval for the present action can be granted, but the responsibility to develop these procedures must be made clear.

Conclusion

For the above reasons, it is the position of the Environmental Quality Council as amicus curiae that until a comprehensive programmatic impact statement providing a full discussion of alternatives and cumulative impacts is prepared, MEPA will not have been fully complied with.

Dated, this _____ day of May, 1975

Environmental Quality Council
Amicus Curiae

_____
John W. Reuss
Executive Director, EQC

By_____
Steven J. Perlmutter
Legal Assistant

_____
Supervising Attorney

HOUSE JOINT RESOLUTION NO. 73

A JOINT RESOLUTION OF THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE STATE OF MONTANA CALLING FOR THOROUGH ECONOMIC ANALYSIS IN ENVIRONMENTAL IMPACT STATEMENTS AND DIRECTING THE ENVIRONMENTAL QUALITY COUNCIL TO ELICIT SUCH ANALYSIS FROM STATE AGENCIES.

WHEREAS, the Montana Environmental Policy Act, enacted by the 1971 Legislative Assembly, requires a full assessment of major agency actions with significant effects on the human environment; and

WHEREAS, the Montana Environmental Policy Act and the guidelines adopted pursuant to that act by the state Environmental Quality Council define human environment to include social, economic and cultural factors as well as aesthetic and environmental factors; and

WHEREAS, the act and guidelines further require a rigorous consideration of all alternative actions and the full range of their economic and environmental costs and benefits; and

WHEREAS, full economic analysis has not typically accompanied agency actions requiring environmental impact statements, thus indicating a failure on the part of the Environmental Quality Council and state agencies to fully implement the Montana Environmental Policy Act and

WHEREAS, it is a matter of serious concern to the legislature that this enactment be fully implemented in all respects,

NOW, THEREFORE, BE IT RESOLVED BY THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE STATE OF MONTANA:

That all agencies of state government are hereby directed to achieve forthwith the full implementation of the Montana Environmental Policy Act including the economic analysis requirements of sections 69-6504 through 69-6514 and guidelines for fully integrated environmental and economic analysis of major actions with significant effects on the human environment; and

BE IT FURTHER RESOLVED, that economic analysis shall accompany environmental impact statements as required by the foregoing sections of the act and shall encompass an analysis of the costs and benefits to whomsoever they may accrue, including considerations of employment, income, investment, energy, the social costs and benefits of growth, opportunity costs, and the distribution effects; and

BE IT FURTHER RESOLVED, that the Environmental Quality Council is directed to monitor agency compliance with this resolution and to report to the 1975 Legislative Assembly the extent of agency implementation of the act's requirements for full economic analysis; and

BE IT FURTHER RESOLVED, that the executive director and staff are directed to fully perform the duties required by section 69-6514 to give consideration to economic goals and requirements of the state in implementation of the Montana environmental policy act; and

BE IT FURTHER RESOLVED, that copies of this resolution be sent to the Governor, the Environmental Quality Council, and all state agencies.

Approved March 16, 1974

Certificate of Service

I, Steven J. Perlmutter, legal assistant for Amicus Curiae, do hereby certify that the foregoing petition and brief Amicus Curiae was duly served by mail upon the attorneys for the plaintiffs, defendants and intervenor on this _____ day of May, 1975.

DATED this _____ day of May, 1975

_____
Steven J. Perlmutter